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No. 08-1349

IN THE
Supreme Court of the United States

DENISE J. COFFEY, AN INDIVIDUAL;
AND KARIE H. BROOKS, AN INDIVIDUAL,
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P.,
A TEXAS CORPORATION; AND
SOUTHWESTERN BELL COMMUNICATIONS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT SOUTHWESTERN BELL TELEPHONE COMPANY IN OPPOSITION

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July 1, 2009

QUESTION PRESENTED

Whether on the facts of this case petitioners failed to meet their burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to establish a genuine issue of material fact as to whether respondent employer's legitimate, nondiscriminatory rationale for its employment action was pretextual.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company states that the originally named defendant, Southwestern Bell Telephone, L.P., has been reorganized as a Missouri corporation under the name Southwestern Bell Telephone Company. Southwestern Bell Telephone Company is owned by Southwestern Bell Texas Holdings, Inc., a Delaware corporation. Southwestern Bell Texas Holdings, Inc. is owned by AT&T Inc., a publicly held Delaware corporation, which was formerly known as SBC Communications Inc. SBC Communications Inc. was named as a defendant in the case below.

The other entity named in the caption of the petition for certiorari, Southwestern Bell Communications, now known as AT&T Operations, Inc., has not been a part of the proceedings in the courts below.

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INTRODUCTION

This case arises out of a reduction in force, or "RIF," that resulted in termination of petitioners' employment with respondent Southwestern Bell Telephone, L.P. d/b/a AT&T Oklahoma ("AT&T Oklahoma"). In the decision below, the Tenth Circuit exhaustively reviewed petitioners' discrimination allegations under the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and affirmed the district court's conclusion that petitioners failed to establish a genuine issue of material fact as to whether AT&T Oklahoma's legitimate, nondiscriminatory rationale for its actions was pretextual. In this Court, petitioners contend that the court of appeals misconstrued evidence and, as a result, incorrectly affirmed the district court's order granting summary judgment. That factbound request for error correction is unworthy of this Court's review.

First, there is no conflict in the circuits that warrants certiorari. Petitioners assert that the decision below conflicts with decisions of the First and Seventh Circuits that, in petitioners' view, support their claim that direct evidence of discrimination as to one plaintiff "preclude[s]" summary judgment as to other plaintiffs (petitioners here) who rely on that same evidence as circumstantial evidence in their own case. But, charitably read, the decisions on which petitioners rely – to the extent they are even remotely related to the issue petitioners seek to raise (most are not) – establish at most that direct evidence as to one plaintiff may be *admissible* as circumstantial evidence as to another. Here, there is no question as to the admissibility of evidence: the parties did not raise any such question below, and the Tenth Circuit's decision is silent on evidentiary matters. Thus,

even if there were a conflict in the circuits on the issue petitioners identify (and there is not), this case would not present it.

Second, the decision below is both factbound and correct. As the Tenth Circuit explained, petitioner Brooks' employment was placed at risk based on her performance evaluation; it was "undisputed" (Pet. App. 10a) that her evaluation warranted placement among at-risk employees; and Brooks did not and could not show the evaluation was pretextual. As to petitioner Coffey, the Tenth Circuit properly rejected reliance on statistical evidence that failed to account, for example, for "differences in various individuals' job performance, experience, and training." *Id.* at 16a. Petitioners' disjointed attempt to call the court of appeals' record-based conclusions into question are unsupported by citation and are contradicted by the record below. Accordingly, even if the Court were inclined to grant review merely to correct the application of settled law to the facts of individual cases, this case would still not warrant review.[1]

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[1] Much of the court of appeals' decision is directed toward a third plaintiff, Jamie Sanders, who has not sought certiorari. *See* Pet. App. 7a-8a, 11a-15a. The petition likewise includes discussion of alleged facts relating to Ms. Sanders, as well as numerous other extraneous, unproven allegations. This brief in opposition addresses only the facts and argument relevant to consideration of the petition. AT&T Oklahoma's silence herein as to any allegations in the petition does not reflect agreement with those allegations or otherwise waive AT&T Oklahoma's right to contest those allegations in an appropriate forum.

STATEMENT OF THE CASE

A. In the fall of 2002, AT&T Oklahoma's Construction and Engineering ("C&E") organization undertook the third of three RIFs necessitated by significant losses of customers beginning in the fall of 2001. Petitioners Denise Coffey and Karie Brooks were first-level managers in AT&T Oklahoma's C&E organization. They were unaffected by the first two RIFs, in late 2001 and spring 2002, but were laid off as a result of the Fall 2002 RIF. *See* Pet. App. 2a.

The AT&T Oklahoma C&E employees affected by the two prior RIFs had been ranked on a statewide basis, with the lowest-ranked employees being "surplussed" irrespective of their geographic location. This approach had resulted in a geographically unbalanced workforce that in turn required employee transfers and the like to remedy. To avoid this same problem in the fall of 2002, AT&T Oklahoma first determined which work groups in which areas could meet the existing workload with fewer first-level managers. To identify employees at risk of being surplussed, AT&T Oklahoma then ranked each first-level manager in each such "Affected Work Group" against his or her peers in that same group. *See id.* at 2a-3a, 55a-56a.

Consistent with AT&T Oklahoma Management Staffing Guidelines, the employee ranking was accomplished by placing all first-level managers in each Affected Work Group in one of three "bands": A, B, or C (in the Fall 2002 RIF, no managers were placed in the lower, "D," band). This placement was based on the managers' most recent annual performance reviews, which had been completed at the end of 2001 (end-of-year 2002 reviews had not yet been conducted). AT&T Oklahoma's Area Managers then

made adjustments as appropriate for performance that had improved or declined since the Spring 2002 RIF. Next, the Area Managers ranked managers in Band C of the Affected Work Groups. These rankings were based on job performance, skills, experience, and training. Managers in Band C of an Affected Work Group who ranked lower than the number designated for retention in that work group were at risk for a layoff. *See id.* at 2a-3a.

Petitioner Coffey was in an Affected Work Group consisting of Managers-Construction in the Oklahoma City/Stillwater area. Her most recent performance evaluation placed her in Band C of that work group. Based on the Area Managers' assessment of Coffey's job performance, skills, experience, and training, Coffey was then ranked last out of the six managers in Band C of her Affected Work Group, which put her at risk of losing her position. Coffey was 45 years old at the time and was the youngest of the managers in Band C. She was one of two female managers in the Affected Work Group; the other female manager was placed in Band B and was not at risk. *See id.* at 4a.

Petitioner Brooks, who was 56 years old at the time and had been in her position less than a year, was in an Affected Work Group consisting of Managers-Engineering in the Enid Area. This work group included two first-level managers. Based on her most recent performance evaluation, Brooks was placed in Band C. The other manager (a 46-year-old male) was placed in Band B. Because Brooks was the only manager in Band C of this Affected Work Group, she was at risk of losing her position based on band placement alone; no additional ranking was necessary. *See id.*

On November 13, 2002, Brooks and Coffey met individually with their respective supervisors. As with the other 20 managers affected by the RIF, petitioners were separately informed in these meetings that their positions were being eliminated or consolidated with another position, and that they were accordingly being "surplussed." Petitioners were subsequently unable to locate another position within the company and were laid off in December 2002.

B. Petitioners filed suit on July 9, 2003, alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"), and various state-law claims.

More than three years later, after extensive discovery and motions practice, the district court granted summary judgment to AT&T Oklahoma. *See* Pet. App. 49a-80a. In a lengthy opinion applying "the McDonnell Douglas burden shifting analysis," *id.* at 63a, the district court first concluded that, although petitioners had established sufficient evidence to survive summary judgment as to their *prima facie* case of discrimination, AT&T Oklahoma had for its part "articulated a legitimate nondiscriminatory reason for the RIF" – *i.e.*, "business hardship resulting from a slow economy, unfavorable regulations, and increased competition." *Id.* at 65a. As a result, "the burden shift[ed] back to plaintiffs to show that [AT&T Oklahoma's] proffered reason is mere pretext for illegal discrimination." *Id.* After exhaustively examining petitioners' allegations related to pretext, the court "f[ound] that none of plaintiffs' allegations or evidence permits an inference of pretext" and ac-

cordingly entered summary judgment for AT&T Oklahoma. *Id.* at 66a; *see id.* at 66a-76a.

Petitioners sought reconsideration before the district court. Petitioners "argue[d] that the Court . . . misunderstood the facts in the case" and expressed the "fear that the highly disputed nature of the evidence before the Court was not made clear." *Id.* at 47a (internal quotation marks omitted). The district court denied reconsideration. *Id.* at 44a-48a.

C. The Tenth Circuit affirmed. "[A]nalyz[ing] [petitioners' claims] under *McDonnell Douglas*," the court of appeals "agree[d] with the district court that [petitioners] ha[d] established prima facie cases of both sex discrimination and age discrimination." Pet. App. 8a. The court "also agree[d] . . . that [AT&T Oklahoma] ha[d] articulated a legitimate, nondiscriminatory reason for [petitioners'] surplus: the RIF." *Id.* "The central issue in th[e] appeal" was accordingly "whether [petitioners] ha[d] provided evidence of pretext" sufficient to survive summary judgment. *Id.*

The court concluded that petitioners had not carried that burden. As to petitioner Brooks – whose "only argument on pretext" was based on her challenge to her placement in Band C (*id.* at 11a) – the court emphasized that it was "undisputed . . . that [AT&T Oklahoma] determined band placement based on an employee's most recent performance evaluation; that a [particular] notation on the performance evaluation from the employee's manager . . . was viewed . . . as demonstrating average performance warranting placement in Band C; and that the performance evaluation[] of . . . Ms. Brooks contained this notation." *Id.* at 10a. "To the extent [Brooks] contend[s] that [she] [is] more qualified or for other

reasons should have been placed in a higher band," the court continued, "[i]t is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation." *Id.* at 10a-11a (last alteration in original; internal quotation marks omitted). The court further noted that "a plaintiff cannot defeat summary judgment by claiming that she would have been retained if different RIF criteria had been used." *Id.* at 11a (internal quotation marks omitted). Because band placement was "Brooks's only argument on pretext," the Tenth Circuit affirmed the district court's entry of summary judgment "on both her age and sex discrimination claims." *Id.*

As to petitioner Coffey's age-discrimination claim, the court of appeals observed that she "was the youngest person in the construction group's Band C" and that "there is no evidence that her band placement was determined by her age." *Id.* The court accordingly "affirm[ed] the district court's entry of summary judgment on her age discrimination claim." *Id.*; *see id.* at 20a-22a n.6. With respect to Coffey's gender-discrimination claim, it was based on the claim that "sex discrimination can be inferred because a greater percentage of women were selected for the RIF." *Id.* at 15a-16a. The court explained, however, that Coffey's "statistical evidence does not take into consideration nondiscriminatory explanations for the disparity – for example, differences in various individuals' job performance, experience, and training." *Id.* at 16a. "Because the statistics fail to account for these variables," the court explained, "they do not constitute evidence of pretext." *Id.*[2]

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[2] Judge McKay concurred in part and dissented in part. He agreed with the panel's disposition of petitioner Brooks' age- and gender-discrimination claims, as well as its disposition of

Petitioners sought rehearing *en banc* on the ground that the court of appeals had "ignore[d] . . . evidence" that in petitioners' view established respondent's "wrongful intent." Petition for Hearing En Banc 15 (Oct. 30, 2008) ("Reh'g Pet."). The Tenth Circuit denied rehearing on November 24, 2008. *See* Pet. App. 81a.

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT'S DECISION PRESENTS NO CONFLICT IN THE CIRCUITS

The portion of the Tenth Circuit's decision that petitioners ask the Court to review reflects a straightforward application of the *McDonnell Douglas* burden-shifting framework that has governed gender-discrimination cases in the federal courts for more than three decades and that lower courts routinely apply in age-discrimination cases.[3] The Tenth

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petitioner Coffey's age-discrimination claim; he dissented from the panel's disposition of Coffey's gender-discrimination claim. *See* Pet. App. 40a-41a. The Tenth Circuit reversed the district court's dismissal as to the age-discrimination claim of the third plaintiff (Sanders) on the ground that she alone had proferred direct (albeit disputed) evidence of age discrimination. *See id.* at 7a-8a. The court also reversed and remanded the district court's dismissal of AT&T Oklahoma's ultimate parent company for failure of service. *See id.* at 17a-18a. Neither holding is relevant here. *See supra* note 1.

[3] Petitioners have never challenged the application of the *McDonnell Douglas* framework to their age-discrimination claims, and the question whether that "evidentiary framework . . . is appropriate in the ADEA context" is accordingly not presented here. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 n.2 (2009). *See generally EEOC v. Chevron Phillips Chem. Co.*, No. 07-20661, 2009 WL 1564164, at *18 n.6 (5th Cir. June 5, 2009) ("The *McDonnell Douglas* framework . . . is used in cases alleging discrimination under many different statutes,

Circuit concluded that petitioners had made out a *prima facie* case of discrimination, recognized that AT&T Oklahoma had articulated a legitimate, non-discriminatory rationale (which petitioners have never disputed), and, after a careful review of the record, concluded that petitioners had failed to carry their burden of establishing a triable issue of fact as to pretext. In so doing, the court of appeals confined itself to applying well-established Tenth Circuit and Supreme Court precedent to the extensive record before it; the court broke no new ground, announced no new principles of law, and acknowledged no tension (much less a conflict) with the decisions of other courts.

Petitioners contend, however, that the Tenth Circuit's decision conflicts with multiple circuits that, they say, hold that direct evidence of discrimination as to one plaintiff – in this case, plaintiff Sanders, *see supra* note 1; Pet. App. 7a-8a – "preclude[s] the grant of summary judgment against co-Plaintiffs who hold the same level management position, were victims of the same RIF and discharged at the same time and/or discharged by the same supervisor." Pet. 24.

Petitioners are mistaken. None of the cases they cite articulates the circumstances in which summary judgment is "preclude[d]," much less do they suggest that summary judgment is precluded on facts resembling those at issue here. Rather, to the extent they are even loosely related to the matter at hand (most are not), the cases on which petitioners rely address questions related to the *admissibility* of evidence.

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and courts regularly employ definitions and standards used in the *McDonnell Douglas* framework under multiple statutes.").

In *Huff v. UARCO, Inc.*, 122 F.3d 374 (7th Cir. 1997), for example, the Seventh Circuit reversed a district court decision to exclude evidence regarding the employer's alleged deviation from a seniority system, where the deviation did not itself affect the plaintiffs. *See id.* at 386. Even as it did so, however, the court made clear that, although "probative," "this piece of evidence alone is [not] enough to overcome summary judgment." *Id.* The case thus goes to the admissibility of evidence (a matter not at issue here) and plainly does not, as petitioners suggest, hold that any particular type of evidence "preclude[s] the grant of summary judgment" in a discrimination case. Pet. 24.[4]

The same is true of *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998), and *Kelley v. Airborne Freight Corp.*, 140 F.3d 335 (1st Cir. 1998). *Hodgens* found "probative" comments by a supervisor suggesting animus toward protected classes but affirmed summary judgment nonetheless. *See* 144 F.3d at 171. *Kelley* rejected a claim by an employer that a trial court abused its discretion by permitting the jury to hear evidence of age-insensitive remarks by the plaintiff's supervisor and another decision-maker. *See* 140 F.3d at 347-48. Here, there was no issue below on the admissibility of evidence as to petitioners, and the Tenth Circuit made no ruling on the issue. Contrary to petitioners' claim, the Tenth

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[4] In *EEOC v. G-K-G, Inc.*, 39 F.3d 740 (7th Cir. 1994), the other Seventh Circuit case that petitioners cite, the Seventh Circuit concluded that age-insensitive comments by a decision-maker specifically about the plaintiff constituted direct evidence of age discrimination. *Id.* at 746. The case says nothing about the circumstantial evidence necessary to create a triable issue of fact as to pretext.

Circuit's decision accordingly presents no conflict with the First Circuit.[5]

Petitioners cite an array of additional cases that, they claim, conflict with the decision below. But, as with the First and Seventh Circuit decisions on which petitioners rely, none of those cases involves issues presented here. *Lindahl v. Air France*, 930 F.2d 1434, 1438-39 (9th Cir. 1991), found that sexist comments were admissible in a gender-discrimination case; it did not, however, find that pretext was established by the sexist remarks. *Morgan v. Arkansas Gazette*, 897 F.2d 945, 951 (8th Cir. 1990), held that, on the facts of that case – which included but were not limited to a decision-maker's characterization of the plaintiff as "an old 'fuddy-duddy'" – the plaintiff had produced sufficient evidence at trial to support the jury's conclusion that age was a determining factor in the plaintiff's discharge. And *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 192-93 (2d Cir. 1991), found that the employer's explanation that the plaintiff was not considered for open positions because he was "overqualified" raised an issue of material fact with regard to pretext. None of these cases can plausibly be read to conflict with the decision below.

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[5] To the extent petitioners intend the block quote (Pet. 27-28) from *Cruz-Ramos v. Puerto Rico Sun Oil Co.*, 202 F.3d 381 (1st Cir. 2000), to suggest a conflict with the decision at issue here, they are mistaken. The First Circuit in *Cruz-Ramos* held, in a RIF case, that consideration of an employee's pension eligibility status was not probative of age discrimination. *Id.* at 386. That is not an issue on which petitioners seek review. Similarly, both *Woodman v. Haemonetics Corp.*, 51 F.3d 1087 (1st Cir. 1995), and *Yates v. Rexton, Inc.*, 267 F.3d 793 (8th Cir. 2001), cited in the petition (at 26), apply the evidentiary rule that admissions of a party-opponent are admissible. That issue also is not presented here.

Finally, petitioners point to two decisions of the Eleventh Circuit that, they claim, are consistent with the Tenth Circuit's decision below (and are therefore purportedly in conflict with the decisions discussed above). *See* Pet. 26 (citing *Rowell v. BellSouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005), and *Macuba v. Deboer*, 193 F.3d 1316, 1324-25 (11th Cir. 1999)). But, just as the cases forming the purported conflict say nothing about the issue that petitioners assert is presented here, the Eleventh Circuit cases on which petitioners rely stand for propositions that are beside the point. In *Rowell*, the Eleventh Circuit held that only evidence that can be reduced to an admissible form – in that case, statements by a manager regarding his personal opinion – should be considered on motions for summary judgment. *See* 433 F.3d at 800. In *Macuba*, the Eleventh Circuit upheld the exclusion of hearsay and other inadmissible evidence, at the same time explaining that certain out-of-court statements that appear to be hearsay may nonetheless be used if they can be rendered admissible at trial. *See* 193 F.3d at 1322-23. Neither decision has any relevance here.

In short, the Tenth Circuit's decision presents no issue on which the courts of appeals are divided. Certiorari should be denied on this basis alone.

II. THE TENTH CIRCUIT'S DECISION IS THE CORRECT RESOLUTION OF AN INTENSELY FACTBOUND CASE

This case is also unsuitable for review because it involves competing views of an extensive, fact-heavy record and because the Tenth Circuit's decision is correct.

First, this case is intensely factbound. The district court's summary judgment decision was entered on

the basis of a record accumulated over approximately 21 months of discovery. That record included 25 depositions and voluminous document discovery. Petitioners' claims of pretext, moreover, rest heavily on nuances that they claim are reflected in the record and that, in their view, preclude summary judgment.

Indeed, petitioners have emphasized this point themselves. In the district court, following entry of summary judgment in AT&T Oklahoma's favor, petitioners expressed the concerns "that the Court . . . misunderstood the facts in the case" and "that the highly disputed nature of the evidence before the Court was not made clear." Pet. App. 47a (internal quotation marks omitted). In the court of appeals, following the Tenth Circuit's affirmance of the district court's entry of summary judgment, petitioners expressed the view that the court of appeals erred because it "ignore[d] . . . evidence" supporting their position. Reh'g Pet. 15. In their certiorari petition, petitioners emphasize their disdain for the Tenth Circuit's view as to the "inference[s] [that] could be drawn from the evidence." Pet. 30. In short, even on petitioners' reading, their request for error correction is deeply factbound, rendering the case highly unsuitable for review.

Second, and in all events, the Tenth Circuit's decision to affirm summary judgment as to petitioners was correct. As the Tenth Circuit explained – in a portion of its decision that was unanimous – because petitioner Brooks was one of only two first-level managers in her Affected Work Group, and because the other manager was placed in Band B, Brooks was at risk solely on the basis of her placement in Band C, which in turn was based on her 2001 performance review. Although Brooks insists that the perform-

ance review was faulty – and that, for example, she should have been permitted to supplement it and would have been rated higher had a different, outdated rating system been used, *see* Pet. 19-21 – the Tenth Circuit correctly explained that "[i]t is the manager's perception of the employee's performance" that counts, and "a plaintiff cannot defeat summary judgment by claiming that she would have been retained if different RIF criteria had been used." Pet. App. 11a (internal quotation marks omitted).[6]

With respect to petitioner Coffey, the Tenth Circuit correctly – and, again, unanimously – concluded that her age-discrimination claim was implausible: she "was the youngest person in [her Affected Work Group's] Band C, and . . . there [wa]s no evidence that her band placement was determined by her age." *Id.* As to Coffey's gender-discrimination claim, the court properly rejected her reliance on statistical evidence purportedly showing disparate impact of the RIF, where the evidence made no effort to ac-

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[6] Despite the undisputed nature of the evidence relating to Brooks' band placement, petitioners assert that the court of appeals failed to weigh evidence that petitioner Brooks' manager, Rick Wooten, told Brooks that she was "being surplussed because of [her] age." Pet. 9, 17-18. But petitioners do not and cannot identify any evidence suggesting that Wooten told Brooks any such thing. On the contrary, Brooks *admitted* in her deposition that Wooten never told her that she was being surplussed because of her age. *See* Deposition of Karie Helen Brooks 88:8-89:18, 171:3-21 (May 17, 2005) (attached as Exhibit 9 to Plaintiffs' Combined Response to Defendant's Motion for Summary Judgment (filed Dec. 16, 2005)). To the extent petitioners mean to refer to Wooten's notes from a separate meeting referring to pension eligibility, there is no evidence that factor affected the employee rankings at issue, and in any event consideration of pension eligibility is not probative of age discrimination, *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993).

count for "differences in various individuals' job performance, experience, and training." *Id.* at 15a-16a. To the extent Coffey challenges the court's resolution of her gender-discrimination claim here – by, for example, rehashing the argument that the RIF ranking criteria were "manipulat[ed]" by "transferring the younger male managers into 'safe' positions just prior to the Fall 2002 RIF," Pet. 11 – the record belies her claims. *See* Pet. App. 53a, 55a-56a (challenged transfers were done to correct geographic work group imbalances by Area Manager who was not aware of future RIF).[7]

In sum, the Tenth Circuit's decision affirming summary judgment as to petitioners is both factbound and correct, further underscoring the absence of any reason to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] Although petitioners refer in passing to generalized "discriminatory animus towards women by Harris," Pet. 11, they "admit[ted] that they never heard . . . Harris . . . make any ageist or sexist comments," Pet. App. 60a, and in fact Harris promoted Coffey to her management position in 2000, *id.* at 75a.

Respectfully submitted,

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